IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
March 18, 2008 Session

STATE OF TENNESSEE v. GORDON MCGEE, SR.

Direct Appeal from the Circuit Court for Warren County
No. F-10956 Don Ash, Judge

No. M2007-01675-CCA-R10-CD - Filed January 13, 2009

Gordon McGee, Sr., the defendant, was granted an extraordinary appeal by this court pursuant to Rule 10 of the Tennessee Rules of Appellate Procedure. This followed a denial of the defendant's pretrial diversion application by the State and the trial court's affirmance of the denial and refusal to grant an interlocutory appeal. After review, we conclude that the denial of pretrial diversion was an abuse of discretion and remand for entry of a grant of pretrial diversion.

Tenn. R. App. P. 10 Extraordinary Appeal; Judgment of the Circuit Court Reversed and Remanded

JOHN EVERETT WILLIAMS, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and JAMES CURWOOD WITT, JR., J., joined.

John P. Partin, McMinnville, Tennessee, for the appellant, Gordon McGee, Sr.

Robert E. Cooper, Jr., Attorney General and Reporter; Clarence E. Lutz, Assistant Attorney General; Lisa Zavogiannis, District Attorney General; and Mark E. Tribble, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The defendant, Gordon McGee, Sr., was indicted for two counts of aggravated assault, a Class C felony, and one count of assault and one count of possession of a Schedule IV controlled substance, both being Class A misdemeanors. While the record before us involves only the defendant's charges, it appears that the defendant's son, Gordon McGee, Jr., was also indicted for the same offenses. However, the son was granted pretrial diversion by the trial court over the State's objection and this court affirmed the trial court in the state's appeal. State v. Gordon McGee, Jr., No. M2007-01883-CCA-R3-CD, 2008 Tenn. Crim. App. LEXIS 728, at *3, (Tenn.Crim.App. Sept. 12, 2008).

The State denied the defendant's application for pretrial diversion, and he then petitioned the trial court for a writ of certiorari. A hearing was conducted, and the trial court requested supplemental filings. Each party filed their respective supplements, with the State later filing two more supplemental responses and the defendant filing a response and supplement afterwards. The trial court upheld the State's denial of pretrial diversion for the defendant and refused permission for an interlocutory appeal pursuant to Rule 9 of Tennessee Rules of Appellate Procedure. This court granted the defendant's application for extraordinary appeal pursuant to Rule 10 of the Tennessee Rules of Appellate Procedure.

This case arises from an incident on October 3, 2006, at a furniture store in McMinnville. The defendant's son parked his vehicle in a public parking lot near the furniture store, which was co-owned by the victims, Patty Davis and Steve Ray. The defendant's son intended to leave his vehicle in the parking lot and be picked up by his wife. Ms. Davis asked the defendant's son to move his vehicle. When he refused, he was told by the two store owners that they would have the vehicle towed. The defendant was called by his son, and he came to the scene and entered the store. An altercation ensued, but there is a dispute between the parties as to whether the defendant or Mr. Ray initiated the physical contact by chest bumping and hand blows. However, there is no doubt that the sixty-year-old defendant was thoroughly overwhelmed by Mr. Ray. At some point, the defendant's son intervened, at which time the defendant drew a handgun, pointed it at Mr. Ray, and told him to stop hitting his son.

The McMinnville Police had been called, via 9-1-1, by Ms. Davis. Patrolman Chris Hutchins arrived and ordered the defendant to put down the gun, and the defendant complied. The patrolman subsequently found hydrocodone tablets on the defendant in a container that was not the container in which his prescribed hydrocodone had been packaged.

After being indicted, the defendant filed an application for pretrial diversion, which reflected that he was sixty years old, married with two adult children, and had been a resident of McMinnville for almost all of his life. The application indicated that he was a high school graduate and had, among other occupations, worked as a general contractor, land developer, and real estate agent. The defendant was still active in business pursuits at the time of the incident, and he belonged to four local civic organizations, and had been an office holder in some at various times. The defendant's medical record was lengthy and dealt primarily with heart problems. He had undergone extensive surgeries, including six heart bypass procedures and a valve replacement. At the time, he wore a pacemaker and took numerous separate medications daily. The defendant had never been charged with a criminal offense prior to these charges.

Rather than filing a separate recitation of events leading to the charges as part of the application, the defendant attached the statement which he had provided to an officer on the date of his arrest. In that statement, the defendant said he went to the victim's store in response to his son's phone call. The defendant told his son to wait outside while he went inside. According to the defendant, Mr. Ray then bumped the defendant with his chest, and words were exchanged. Mr. Ray raised his hand, which the defendant slapped away. Mr. Ray then struck the defendant repeatedly

as the defendant attempted to strike back. The defendant's son then entered the store, and, after Mr. Ray began attacking the son, the defendant pulled his gun and told Mr. Ray to stop. Mr. Ray raised his hands and, at that time, the defendant pointed the gun away from Mr. Ray. At this point, Patrolman Hutchins entered the store and told the defendant to put the gun down. The defendant complied.

As part of the application, the defendant provided sixty-one letters of glowing support from members of the local community. The authors included both present and former elected officials, including a former sheriff of Warren County, and other citizens who were effusive in their praise of the defendant's character and integrity.

Testimony at the defendant's preliminary hearing by Ms. Patty Davis, a victim, contradicted portions of the defendant's statement. According to Ms. Davis, after she had called for a tow truck, the defendant arrived and announced that the parties were going to settle their dispute. Ms. Davis stated that the defendant bumped Mr. Ray and began punching him. Mr. Ray fought back, and the defendant's son also became involved in the fight. The defendant brought out a gun, pointed it at both Mr. Ray and Ms. Davis, and said he would shoot them.

On cross-examination, Ms. Davis admitted that the parking lot in question is public and has no prohibited parking spaces. She also acknowledged that Mr. Ray cut the defendant below the eye with a fist and that the defendant was bleeding from the eye, nose, and mouth when he pulled the gun.

Patrolman Hutchins also testified at the defendant's preliminary hearing. He stated that the defendant was armed with a .380 handgun with a bullet in the chamber and one in the magazine. According to Hutchins, the defendant complied with the officer's order to put the gun down, which was pointed in the direction of Ms. Davis when he entered the store. The officer handcuffed the defendant and then found the four pills he identified as hydrocodone. The defendant informed the officer that he had displayed the gun because of the danger he faced due to a possible blow to his pacemaker. Pictures of the defendant showed cuts on the lip and below the eye, as well as other bleeding. On the other hand, Mr. Ray had few marks and had no evidence of bleeding. Officer Hutchins also confirmed that the defendant had a valid handgun carry permit.

The State's initial response denying the defendant's application for pretrial diversion was filed June 15, 2007. Following a statement of facts, the State responded as follows:

> **Defendant's Social History and Mental and Physical Condition**
>
> The State has considered and assigns little weight to the fact the Defendant is 60 years of age, married for [sic] and the father of two (2) children.
>
> The State has assigned considerable weight to the fact the Defendant is a longtime resident of McMinnville, Warren County, Tennessee. He has a High

School Diploma, has been a productive member of the community, worked in the self-employed field of construction, and has significant contributions to the community through community service and is a member of the Warren County School Board. The State has also received, reviewed and considered the numerous letters of support from the community.

This significant social standing also gives the State considerable concern and great weight is given to the fact that the Defendant would appear to be above-average intelligent as demonstrated by his education and successful employment. He has held himself out as a leader of this community and this fact raises concern over the judgment used by the Defendant in initiating this confrontation which resulted in deadly force being used in a personal conflict, and the example it sets before our community.

The State has reviewed the letter describing the Defendant's health status. The Defendant's health did not prevent him from being out in the community, armed and intervening in his adult son's argument with a store owner. The State places minimal weight to the health of the Defendant in this action.

The State has also considered and places average weight on the fact that it is the first criminal conduct that the Defendant has engaged in.

Interest of the Public in Deterrence

The State considers and places considerable weight upon the interest of the public and law enforcement in combating and deterring the use of deadly force even in the presence of law enforcement, which places the public, the Defendant, and law enforcement officers at risk of serious harm or death.

The State considers and places great weight upon the specific deterrence of others who might be predisposed to commit similar acts. The State has a significant interest in deterring conduct wherein the individuals choose to use physical force, intimidation, and the use of weapons to resolve interpersonal conflict.

The State also places medium weight upon the specific deterrence of others by being predisposed to commit similar acts. The State is disturbed and places an immense amount of weight on the fact that in the Defendants' Request for Diversion, he makes no independent recitation of the facts of the offense under item number 32, and he expresses no remorse whatsoever, for the confrontation. He expresses no assurance that he would handle personal conflicts in a different fashion in the future.

Considering all of these factors, both positive and negative, the State is convinced that the Defendant is not amenable to correction, nor that the public

interest and the ends of justice would be well served by granting diversion under the facts and circumstances of this case. Therefore, the State hereby denies Defendant's Application for Pre-Trial Diversion.

At the hearing on the writ of certiorari, the trial court asked the defendant to supplement the application and asked the State to respond. The State did not object to the trial court's request for the defendant to supplement his petition. The defendant filed a supplemental petition, and the State followed with two responses filed on consecutive days, to which the defendant filed a response.

In the defendant's initial supplement to his petition, he expressed his remorse and his understanding that his actions did not conform with the standards he had attempted to follow in his life. The defendant indicated he had enrolled in an anger management class and had voluntarily surrendered his gun permit. He stated that he no longer carried a weapon. Moreover, the defendant said that he had avoided contact with the victims to the point of not patronizing other businesses in the furniture store area.

The State's second supplemental response restated much of the original but added a charge that the defendant was attempting to intimidate the victims by parking near their house and staring at them. The defendant's response to this reiterated that he had no contact with the victims. However, he explained that the victims live in a subdivision he developed and where he retains ownership of more than one hundred lots and six houses. In addition, he keeps construction equipment in the area and, by necessity, is in that neighborhood frequently. He specifically denied any contact or any attempt to intimidate the victims, however.

Pretrial Diversion

The standards of eligibility for pretrial diversion are contained in Tennessee Code Annotated section 40-15-105. The defendant must not have previously been granted diversion; must not have a prior misdemeanor conviction for which a sentence of confinement was served or a prior felony conviction within a five-year period after completing the sentence or probationary period for such conviction; and must not be charged with a Class A felony, a Class B felony, or certain Class C felonies, a sexual offense, driving under the influence, or vehicular assault. *Id.* § 40-15-105(a)(1)(B)(i) (a)-(c) (2006).

There is no presumption of entitlement to pretrial diversion. *State v. Curry*, 988 S.W.2d 153, 157 (Tenn. 1999). The "defendant bears the burden of establishing that pretrial diversion is appropriate and in the interest of justice; thus, it is the defendant who must produce substantial favorable evidence for the district attorney general's consideration." *State v. Bell*, 69 S.W.3d 171, 179 (Tenn. 2002).

It is within the discretion of the district attorney general to grant or deny a defendant's application for pretrial diversion. See T.C.A. § 40-15-105(b)(3). When considering the defendant's application, the prosecutor should focus on the defendant's amenability to correction. Any factors

tending to reflect whether a particular defendant will or will not become a repeat offender should be considered. *State v. Hammersley*, 650 S.W.2d 352, 355 (Tenn. 1983).

> Among the factors to be considered in addition to the circumstances of the offense are the defendant's criminal record, social history, the physical and mental condition of defendant where appropriate, and the likelihood that pretrial diversion will serve the ends of justice and the best interest of both the public and the defendant.

Id. In *State v. Bell*, it was reiterated that, in reviewing a request for pretrial diversion, "the district attorney general has a duty to exercise his or her discretion by focusing on a defendant's amenability for correction and by considering all of the relevant factors, including evidence that is favorable to a defendant." 69 S.W.3d at 178.

A denial must be in writing, list the evidence considered, discuss which factors were considered, and discuss the weight accorded to each factor. *State v. Pinkham,* 955 S.W.2d 956, 960 (Tenn. 1997). "This requirement entails more than an abstract statement in the record that the district attorney general has considered these factors." *Curry*, 988 S.W.2d at 157 (citation omitted).

Upon denial, the defendant may apply to the trial court for a writ of certiorari. T.C.A. § 40-15-105(b)(3). "On review, the trial court may only consider the evidence considered by the district attorney general and must determine whether the district attorney general has abused his or her discretion." *Bell*, 69 S.W.3d at 177. An abuse of discretion may only be found where the prosecutor fails to consider all the relevant factors or reaches a decision not supported by substantial evidence. *Id.* The decision should be reversed if the district attorney general has denied diversion and failed to consider and weigh substantial evidence favorable to a defendant. *Id.* at 179.

Analysis

Despite the wide range of discretion which district attorney generals are allowed in pretrial diversion cases, we conclude that, in this case, the State failed to focus primarily on the defendant's amenability to correction as directed in *State v. Thompson*, 189 S.W.3d 260, 267 (Tenn. Crim. App. 2005). In addition, we conclude that certain factors were improperly considered or misconstrued as negative, as opposed to positive, for the defendant. Moreover, evidence favorable to the defendant was either ignored or not properly considered. A review of the trial court's consideration of and weight assigned to each factor is necessary.

The State argues on appeal that it was error for the trial court to require the defendant to supplement his original application for pretrial diversion. In reviewing the prosecutor's decision, the trial court must consider only the evidence considered by the district attorney general and conduct a hearing only to resolve factual disputes concerning the application. *State v. Curry*, 988 S.W.2d 153, 157-58 (Tenn. 1999). However, because the State failed to object, this issue is waived. See Tenn. R. App. P. 36(a).

The State's final denial letter essentially incorporated the initial denial but added allegations of intimidation against the defendant among other slight changes. The State minimized the factual discrepancies which existed and attributed them to the limited proof at the preliminary hearing. However, the law is clear that the State's responsive letter must identify any factual disputes between the evidence relied upon and the defendant's application. *Curry*, 988 S.W.2d 153, 157. Additionally, the State added to the facts in dispute by its later filed supplements which alleged that the defendant attempted to intimidate the victim. This was answered by the defendant but, nevertheless, the State indicates that the factual disputes were "of little consequence." This failure to identify factual disputes is an abrogation of the State's duty.

The trial court conducted a hearing on July 18, 2007, and allowed the parties to argue, on the record, their responses to the State's denial of pretrial diversion. Following the hearing, the trial court found that the State did not abuse its discretion by denying the defendant pretrial diversion because all the relevant factors were considered. The State specifically stated the reasons for denial of pretrial diversion were; the defendant aided his adult son in a confrontation, that the defendant initiated a fist fight, and that the defendant produced a gun when he was losing the fight. The State further stated that the reason for denying the diversion was to deter this type of conduct underlying the offense from occurring in their community.

The State assigned "little weight" to the defendant's age, marital status, and parenthood of two children. In isolation, this factor may be minimized but when focusing, as the State must, on the defendant's amenability for correction, these factors deserve more favorable weight. Moreover, the response does not identify to which side the factor should be assigned; thus, it is an incomplete response.

The State initially assigned "some positive weight" to the many letters of support from community members and office holders. However, the State then attempted to negate these by designating the defendant as a "leader in the community" and converting this factor to a negative. The State stated that the defendant's alleged status "gives the State considerable concern" and then proceeds to give "great weight" negatively to his being a "leader of this community." The defendant was not an elected officeholder and was privately employed. In any event, we cannot agree that an outpouring of support, as was expressed by the cross section of citizens, should be construed as bearing any negative weight, much less "great" negative weight. The support shown the defendant by the various citizens should not disserve the defendant.

Minimal weight was assigned to the defendant's health status because he was able to participate in the incident. Although the defendant's health was fragile and he was vulnerable to abrasive contact due to his pacemaker, we conclude that it deserves minor consideration, except in the focus of the defendant's amenability to correction. Such a fragile defendant is unlikely to become engaged in other similar physical confrontations.

The State, argued as follows: "The State has also considered and places average weight on the fact it is the first criminal conduct that the Defendant has engaged in." If the State's focus was on amenability to correction, this incident should be viewed as aberrant behavior, which is unlikely to be repeated. We conclude that the defendant's history was erroneously given only average weight. This factor was highly relevant evidence in favor of the defendant and was not properly considered in the interests of the defendant's amenability to correction.

The State gave an "immense amount of weight" to the defendant's alleged intimidation of the victims. The State alleges that this conduct demonstrates the defendant has no regard for the truth. The intimidation consisted of the defendant's allegedly staring at Mr. And Mrs. Ray in their home. The defendant's response stated a valid reason for the defendant's presence near the victim's home; it was within a subdivision he developed and regularly walked in. We cannot agree that these actions, even if valid, deserved immense weight against the defendant or demonstrated a disregard for the truth.

"Great weight" was placed on the deterrence of others who might commit similar acts. Although deterrence is present in every case, it should be examined in the context of each case, assigning such weight, credit, and value as the circumstances warrant. *State v. Michael*, 629 S.W.2d 13, 14-15 (Tenn. 1982). In the case at hand, we conclude that deterrence was inordinately weighed against the defendant in consideration of all other circumstances.

The State placed an "immense amount of weight" on the fact that the defendant's initial application contained no independent recitation of facts of the incident. The defendant's application instead contained a statement given by the defendant to an investigating officer shortly after the incident. This objection by the State is mistaken and inappropriate. The attachment of a defendant's statement has been previously approved by this court as a satisfactory statement of the facts. *State v. Russell L. Tipton*, No. M2006-00260-CCA-R9-CO, 2007 Tenn. Crim. App. LEXIS 636 (Tenn. Crim. App., at Nashville, Aug. 9, 2007). The statement attached was adequate to explain the defendant's version of events. The State seems to seek an agreement by the defendant of all facts alleged by the State. This is not required; furthermore, the State cannot require a guilty plea for a grant of pretrial diversion. *State v. King*, 640 S.W.2d 30, 33 (Tenn. Crim. App. 1982).

After review, we conclude that the denial of pretrial diversion in the instant case constituted an abuse of discretion. *See Russell L. Tipton*, slip op. at ___ ("Because there is no substantial evidence to support the decision of the prosecutor, we are compelled to reverse the prosecutor's denial of pretrial diversion and remand to the trial court with an instruction that pretrial diversion is to be granted."); *see also State v. Harold L. Cassell*, No. M2004-01784-CCA-R3-CD, slip op. at ___ (Tenn.Crim.App., Nashville, Aug. 5, 2005)(reversing a denial of judicial diversion and remanding with "instructions that the defendant be placed on judicial diversion" because "the record does not contain substantial evidence of the seriousness of the offense such as to outweigh all other factors favoring judicial diversion") (Welles, J., dissenting). *Cf.State v. Kristi Dance Oakes*, No E2005-01668-CCA-R10-CD, slip op. at ___ (Tenn.Crim.App., Knoxville, Jan. 23, 2006) ("Because the legal basis for this ruling on appeal is essentially the prosecutor's failure to follow prescribed

guidelines and not because the [relied-upon grounds were] per se inapposite, we remand with instructions for the trial court to order the prosecutor to withdraw his denial of diversion and to embark upon a full consideration of the applicaiton as the guidelines require."); *State v. Albert Fitzgerald Turner*, No. W2004-01853-CCA-R3-CD, slip op. at ___ (Tenn.Crim.App., Jackson, Aug 1, 2005) ("Where a trial court fails to consider all of the appropriate factors and its statement of the reasons for [judicial diversion] denial is vague and conclusory, this Court will remand the matter for the trial court's reconsideration."); *State v. Robbie Carriger*, No. E2000-00823-CCA-R3-CD. Slip op. at ___ (Tenn.Crim.App., Knoxville, Dec. 20, 2000) ("However, because the trial court failed to undertake the weighing process required by *Herron*, we reverse the grant of [pretrial] diversion and remand the case for the trial court to consider and weigh the relevant factors in relation to the defendant's entitlement to pretrial diversion."). The defendant has clearly established a compelling and justifiable petition for pretrial diversion and is particularly qualified as amenable for correction.

Conclusion

Based upon the foregoing, we reverse and remand for an entry of a grant of pretrial diversion.

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JOHN EVERETT WILLIAMS, JUDGE